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Wai Yee WAN
Singapore Management University, wywan@smu.edu.sg

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Legal Transplantation of UK-Style Takeover Regulation in Singapore

Wai Yee Wan*

Abstract

In the early 1970s, Singapore adopted the Singapore Code on Takeovers and Mergers (Takeover Code) and set up the Securities Industry Council (SIC), both of which were based on the UK City Code of Takeovers and Mergers (City Code) and UK Takeover Panel respectively. The legal transplantation occurred even though Singapore did not have the equivalent of the business community to the City of London. The concentrated ownership structure of Singapore listed firms also differs significantly from the Berle and Means ownership model found in the UK firms, even today.

This chapter gives an account of takeover regulation in Singapore and explains the reasons for the adoption and maintenance of the UK-takeover regulation from the perspectives of demand side (being the individuals, firms or public) and supply side (being the legislature, courts and regulators) of rule production.

First, the regulatory framework has been responsive to blockholders generally by successive increasing the mandatory bid threshold progressively from 20% in 1974 to 30% in 2002 and adhering to the creeper rule (which was abolished by the UK in 1998). Together with the availability of the whitewash waiver, blockholders have more flexibility to increase their stake or to inject fresh cash/assets into the company without making a mandatory bid for the remaining shares.

Second, even though concentrated shareholdings are the norm among listed companies, there was a significant proportion of companies where any group of blockholders does not have statutory control (that is, more than 50%). The requirement in the Takeover Code that directors of a target company must seek shareholder approval for action that would frustrate a *bona fide* bid limits the potential for these blockholders to prevent *bona fide* bids from succeeding, in the absence of case law.

Third, while investor protection rights in Singapore under company law and takeover regulation are similar to the UK, there remains an important area of difference which favour the blockholders seeking to privatise targets; blockholders are able to use their shareholding to first delist the target, an option that is not readily available in UK.

Finally, adopting the *process* of regulation in the UK model enables the SIC a quick and efficient process to informally and proactively enforce norms and public interests and this process of takeover regulation has deeper, substantive consequences. Recent examples will be drawn to show that SIC has used the power to intervene or adjust the legal rights of the market participants, particularly the bidder, where such rights are inconsistent with the public interests.

This chapter then sets out the effect of the legal transplantation on the market for corporate control in Singapore, in comparison with the UK, and concludes by answering the normative question of whether the current model of takeover regulation should continue as the Singapore stock market attracts more foreign participation but also experiences a higher level of concentration in its listed companies and delistings.

I. INTRODUCTION

In 1973, the Securities Industry Council ("SIC") was set up as a specialist body to administer and enforce Singaporean takeover regulation. The SIC draws its members from the private and public sectors, with the majority of voting power from the private sector.[1] In the following year, the Singapore Code on Takeovers and Mergers ("Takeover Code"), based on the UK City Code on Takeovers and Mergers ("City Code"), came into force. The Takeover Code is the primary source of regulation of the conduct of parties to a public takeover, together with the Securities and Futures Act ("SFA"),[2] the listing rules of the Singapore Stock Exchange ("SGX") and principles of company law (such as those defining the relationship between the directors of the company and its shareholders found in the Companies Act[3] and case law). While the SIC and the Takeover Code have statutory backing found in the SFA, the Takeover Code was, in the tradition of the City Code, self-regulatory. The SIC's role was to enforce the Takeover Code and resolve takeovers disputes in a non-judicial setting.

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[1] 'Singapore has more bite than London', *Business Times* (29 September 1978).
[2] Securities and Futures Act, Cap 289, 2006 Rev Ed, s. 139(4)
[3] Companies Act, Cap 50, 2006 Rev Ed ("Companies Act").

Prior to 2002, the Takeover Code was amended in 1979 and 1985. In 2002, following lengthy consultations in 1999[4] and 2001,[5] the Takeover Code was substantially re-written to bring it up to date with international norms. Further amendments were made in 2007 and 2012. However, two fundamental rules of the Takeover Code which were transplanted from UK City Code, namely the mandatory bid rule and the prohibition on the target board from frustrating any bona fide bid in the absence of shareholder approval (the no-frustration rule), have remained largely unchanged since 1974. In particular, in 1999, the SIC led a consultation to consider the possibility of adopting a US-style takeover regulation, which allows the target board to block a hostile bid, but this possibility was rejected by market participants.

In an influential article discussing the evolution of the hostile takeover regime in UK and US, Armour and Skeel argue that UK takeover regulation, favouring greater protection of shareholders' interests found in the City Code, is attributable to the UK's self-regulatory regime and aggressive lobbying by the institutional shareholders, as opposed to the US where the courts remain the arbiter of takeover disputes.[6] The UK approach clearly favours institutional investors in companies with significantly dispersed shareholdings. More recently, Armour, Jacobs and Milhaupt extended the analysis to Japan, which has adopted elements of US takeover regulation and which has largely

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[4] SIC, 'Consultation Paper on Revision of the Singapore Code on Takeovers and Mergers' (1999) ("1999 Consultation"), available at www.mas.gov.sg/sic (last accessed 30 June 2016).

[5] SIC, Securities Industry Council Issues Draft Revised Code on Takeovers and Mergers (2001) ("2001 Consultation"), available at www.gov.sg.sic (last accessed 30 June 2016).

[6] See John Armour and David Skeel, Jr, 'Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of U.S. and U.K. Takeover Regulation', *Georgetown Law Journal* 95 (2007), 1727-1794 (arguing, in the context of explaining why US and UK have different substantive rules on defensive measures, that the mode of regulation matters).

dispersed shareholdings of publicly listed companies. They argue that the diversity in the hostile takeover regimes in all three jurisdictions is the product of the interaction between the ‘demand side’ (being the individuals, firms or public) and the ‘supply side’ of rule production (being the legislature, courts and regulators).[7] Armour and Skeel make an important contribution in explaining that the process of takeover regulation does influence the outcome or the substance of the regulation. UK takeover regulation is shaped by institutional shareholders pre-empting legislative intervention while US regulation is derived from judge-made case law, largely from Delaware.

The question then arises whether this theory based on the interaction between demand and supply in explaining takeover regulation in UK/US can also be extended to their legal transplants in other jurisdictions, particularly those whose public companies are dominated by concentrated shareholdings. The adoption and enduring nature of UK-style of takeover regulation in Singapore presents an interesting case study. *Prima facie*, the adoption and widespread acceptance of the UK-takeover regime is a puzzle since the public ownership structure in Singapore has been, and remains, largely concentrated. Why would existing large shareholders (also known as blockholders in this paper) favour the mandatory bid rule which not only prevents them from obtaining a control premium for their controlling stake but also restricts them from increasing their stake without having to make a mandatory bid? Why would existing blockholders support a no-

[7] See John Armour, Jack B Jacobs, Curtis J Milhaupt, ‘The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework’, *Harvard International Law Journal* 52 (2011), 221-285

frustration rule on target board action since such a rule is unnecessary; their concentrated shareholdings themselves act as a takeover defence against potential unfriendly bids?

This paper argues that consistent with the analysis of Armour and Skeel, the reason for Singapore's enduring support (with small but important modifications) of the UK-style of takeover regulation is the interaction between the relevant interest groups, in this case, being the significant blockholders (generally family groups or the state), and the regulator.[8] However, Singapore's legal transplant of UK-style takeover regulation has resulted in two different outcomes for the shareholding structures of public companies and the landscape of the market for corporate control.

First, the shareholdings of Singapore companies are becoming more concentrated while the opposite is occurring for shareholdings of UK companies. This paper argues that the mandatory bid rule, when introduced in a jurisdiction with concentrated shareholdings, is a substantial factor contributing to the reinforcement of the low dispersal of ownership. Second, in respect of the market for corporate control, there are two important differences in the way takeovers are structured in both jurisdictions. An M&A transaction in Singapore is much less likely to be hostile or unsolicited in Singapore than in the UK. Thus, for those who argue that the disciplinary effect of hostile takeovers on management is good for the market,[9] the implementation of the UK-style of takeover regulation has not led to such disciplinary effect in Singapore. Further, outside

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[8] Stijn Claessens, Simeon Djankov and Larry HP Lang 'The separation of ownership and control in East Asian Corporations' *Journal of Financial Economics* 58 (2000), 81-112.

[9] E.g. see Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (1991) pp. 171-73.

of general offers, the most significant method of taking a company private in Singapore is effected via a delisting coupled with an exit offer. In contrast, outside of general offers, the most significant method of taking a company private in the UK is through a scheme of arrangement (which, as explained below, provides greater protection to the minority shareholders).

Part II first sets out the background and the regulatory landscape of takeovers in Singapore. Part III argues that the takeover regime in Singapore represents the outcome of the interaction between significant interest groups and the regulator. First, since the 1970s, small but significant modifications to the mandatory bid rule (including the creeper provisions)[10] and its exceptions have ensured the continued relevance of the mandatory rule to blockholders' needs. Second, the argument that the no-frustration rule is irrelevant in jurisdictions with concentrated shareholdings assumes a binary division between dispersed shareholding and majority-controlled companies (that is, more than 50%). However, there are companies where there is more than one blockholder and none of these blockholders have majority control of the company; this is known as 'insecure blockholder control'.[11] In such cases, the requirement of prior shareholder approval for potentially frustrating actions restricts these insecure blockholders from taking measures to prevent other bona fide bids from succeeding.

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[10] The 'creeper' provisions were abolished by the UK Takeover Panel in 1998. These provisions allowed a person who held between 30% and 50% of the voting rights of a public company to increase his holding by up to 1% in any 12 month period without having to make a mandatory bid for the company.

[11] This term is borrowed from Paul Davies, Edmund Philipp Schuster, Emilie Walle de Ghelcke, 'The Takeover Directive as a Protectionist Tool' *European Corporate Governance Institute Working Papers* No.141/2010. For examples of 'insecure' blockholder control, see below, nn 63 and accompanying text.

Finally, from the supply side of rule production, once the SIC has established its authority, the process of regulation allows the SIC a quick and efficient process to informally and proactively enforce norms and public interests. Drawing from examples where the SIC has used its power to informally and proactively enforce norms and public interests, this process of takeover regulation has deeper, substantive consequences. The SIC has used their power to intervene or indirectly adjust the parties' legal rights if such rights are inconsistent with the public interest of ensuring a fair and orderly securities market. Otherwise, if such behaviour is left unchecked, there may be a push for greater legislative reforms or regulatory intervention. Such phenomenon is also found in the UK; the establishment of the Takeover Panel and the City Code have pre-empted greater legislative reform.[12] The establishment of the SIC also means that very few disputes reach the courts.

Part IV then addresses the effect of legal transplantation on the shareholding structures of publicly listed companies and the market for corporate control in Singapore based on empirical data that is available since the 1990s. The empirical evidence shows that: (1) since the 1990s, the concentration of shareholdings of Singapore-listed companies has increased and Singapore has moved even further away from the Berle and Means model that is characteristic of UK firms; (2) hostile takeovers are non-existent and unsolicited takeover bids are rare as compared to the UK; and (3) the dominant method for effecting going private transactions by controlling shareholders in Singapore, outside

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[12] e.g. see Armour and Skeel, 'Who Writes the Rules for Hostile Takeovers, and Why', p. 1771. See Andrew Johnston, *The City Takeover Code*, n21, pp. 41(quoting the Chairman of the committee that produced the City Code as their last chance before legislation).

general offers, is delisting coupled with a general offer, as compared to the scheme of arrangement in the UK.

Part V then addresses the recent trends and their implications on takeover regulation in Singapore. First, will the current regulatory framework, which rests on informal regulation and reputational sanctions among the business and financial community, continue to be sustainable, particularly with the rise of foreign listings and an influx of foreign investment? Second, with the potential overlap in jurisdiction between the courts and the SIC, will the parties be able to seek redress in the courts in takeover disputes and obtain a different result? Part V concludes.

II. BACKGROUND AND OVERVIEW OF TAKEOVER LANDSCAPE IN SINGAPORE

1. The Regulatory Landscape

The legal system of Singapore is based on the common law, where case precedents and statutory provisions exist side by side. Singapore obtained its independence in 1965, and the Companies Act[13] was passed in 1967. The Companies Act of 1967 was based on the Australian Companies Act 1961[14] and the UK Companies Act

[13] Act 42 of 1967.
[14] Victoria No. 6839/1961.

1948. The provisions in the current edition of the Companies Act[15] that are relevant to takeovers include the statutory statement of directors' duties (particularly defining the relationship between the directors and the shareholders),[16] capital maintenance rules[17] and schemes of arrangement,[18] schemes of amalgamation[19] and the compulsory acquisition of minority shareholders' shares.[20]

In addition to company law, there are more specific regulations governing the takeover process, principally, the SFA and Takeover Code. Section 138 of the SFA provides for the SIC to be set up. Section 139 of the SFA provides that for the more effective administration, supervision and control of take-over offers and matters connected therewith, the Monetary Authority of Singapore shall, on the advice of the SIC issue a Takeover Code. Section 140 of the SFA lists the offences relating to takeover offers. It is an offence for a person to give notice or publicly announce that he intends to make a takeover offer if he has no intention to make one. It is also an offence to make a takeover offer if a person has no reasonable or probable grounds for believing that he will be able to perform his obligations pursuant to the offer being accepted or approved.

The original impetus for the setting up of the SIC (and the Takeover Code) was similar to the setting up of the City Panel on Takeovers and Mergers in the UK.[21] Prior to

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15 Companies Act, 2006 Rev ed.
16 Companies Act, s 157.
17 Companies Act, ss 78A-K.
18 Companies Act, s 210.
19 Companies Act, s 215A-J.
20 Companies Act, s 215.
21 For a historical account, see A Johnston, *The City Takeover Code* (Oxford University Press, 1980).

1974, the conduct of takeovers and mergers in Singapore was largely *laissez faire*; the companies' legislation which applied at that time had many deficiencies and the stock exchange was a self-regulatory body.[22] Similar to the UK's British Aluminium affair which prompted the adoption of the Notes of Amalgamation of British Businesses in 1959 (subsequently replaced by the City Code on Takeovers and Mergers in 1968), the pivotal transaction that demonstrated the inadequacy and lack of administrative control in supervising takeovers in Singapore was the takeover of Haw Par Brothers International by Slater, Walker (SW), UK Merchant Bank in 1971.[23]

SW had been involved in asset stripping activities in Australia and the UK. In 1971, SW purchased 46% of Haw Par shares from the existing shareholder, Aw, together with another 6% in the market. The takeover was conditional upon Haw Par's 31% stake in Chung Khiaw Bank being increased to 51%. This additional 20% was to be acquired by Haw Par from Aw's family and associates and the total cost to Haw Par for the 51% stake was S$8 million. The share price of Haw Par steadily rose until the date of the announcement of the takeover.

In the meantime, SW procured Haw Par to sell its Chung Khiaw Bank stake to United Overseas Bank ("UOB") for S$22 million, which would result in Haw Par making a profit of $14 million. The initial announcement of the proposed takeover of Chung Khiaw Bank upset its staff. In the face of opposition from the staff, UOB agreed not to

[22] See Pheng T Tan, *Securities Regulation in Singapore and Malaysia: A Primer on the Laws of the Stock Market with Cases and Materials* (Stock Exchange of Singapore, 1979), pp. 28-29.

[23] See 'Annex to Speech by the Minister for Finance', *Singapore Parliamentary Debates*, 31 (1971), col 137. See also Philip Pillai, 'Corporate Takeovers in Singapore' *Malaya Law Review* 15 (1973) 170-233.

proceed with the takeover and that Aw would repurchase the Haw Par shares from SW. However, SW subsequently procured Haw Par to proceed with the sale of the Chung Khiaw Bank shares to UOB.

In the meantime, conflicting statements over the purchase of Chung Khiaw shares were issued, causing price fluctuations in the market. The MAS and the SGX required the participants to explain their actions. Subsequently, the Minister for Finance characterised the conduct of the parties as 'though not illegal, [this] would constitute unacceptable behaviour in an international financial centre'.[24]

In addition to the liquidation of Chung Khiaw shares, SW also procured Haw Par to sell Sin Poh, which controlled the newspapers in Singapore and Penang, for S$5 million. [25] The liquidation of Haw Par's assets (including its stake in Chung Khiaw and Sin Poh) raised alarm among the business community at the profiteering by SW and caused the Government to study the takeovers in greater detail.

The activities of SW coincided with general turmoil in the stock market in Singapore and Malaysia in the late 1960s. The collapse of two large listed companies, Federal Paper Products and Eupoc Pulp and Paper Industries Ltd, together with the lack of control over the qualifications of securities dealers, demonstrated that the *laisses faire*

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[24] See SIC, 'Regulatory Framework, Securities Industry Council and Takeover Code' in Wai Y Wan and Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (Lexisnexis, 2013), para 3.2-3.3. See also 'Speech by the Minister for Finance', *Singapore Parliamentary Debates*, 31 (1971), col 114.

[25] 'It's a Deal: $22 million in cash' *Straits Times*, (18 June 1971).

nature of stock exchange regulation had many deficiencies.[26] Cognisant of these issues, in 1969, George M Ferris, the then Governor of the New York Stock Exchange, was appointed to study the securities industry situation. In an influential report,[27] he recommended that Singapore should continue with self-regulation of the stock exchange as self-regulation could never be effectively replaced by supervision undertaken by a centralised independent regulatory body along the lines of the US Securities Exchange Commission.[28]

The Singapore Government adopted Ferris's recommendations to continue self-regulation by the stock exchange. At the same time, the Government rejected a statutory regulation of takeovers, on the ground that it was impossible for legislation to cover all abusive conduct.[29] It was decided that the UK City Code on Takeovers would be adopted in Singapore. While the City Code was not perfect and was subject to criticism in the UK,[30] and Singapore lacked the expertise found in the City, a 'calculated risk' was taken to transplant the City Code and the UK Takeover Panel.[31] However, two significant

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[26] Pheng T Tan, *Securities Regulation in Singapore and Malaysia*, p. 30.

[27] George M Ferris, 'A Study of the Securities Market in Singapore and Malaysia', IESC Project 2067 (1970) ("Ferris Report")

[28] In rejecting the US model, the Ferris report noted the following:
(1) There was only one securities market in Singapore, as compared to a number of securities markets in US;
(2) The vast size of the US, its markets, states and history of the securities market made strong centralized control important; and
(3) The SEC has considerable resources of commercial, financial and stock market expertise.

[29] Boon T Tan 'Forms of Control Exercised Over Securities Industry – A Comparative View' *Singapore Stock Exchange Journal*, 2 (1974) 5-11

[30] e.g. A Johnston, *The City Takeover Code*, pp. 82-83 (in the early 1970s, there were allegations made that certain companies failed to comply with the spirit of the City Code, which in turn led to questions as to the effectiveness of the self-regulatory system).

[31] Boon T Tan, 'Forms of Control Exercised Over Securities Industry – A Comparative View' p. 8.

modifications were made: first, statutory backing was provided to the SIC[32] (which was relatively novel since the UK Takeover Panel at that time did not have statutory backing);[33] second, the companies legislation was amended to provide that directors of companies could have regard to the rulings of the SIC in the exercise of their powers.[34] By legislatively placing the SIC within the central bank and the securities regulator, the Monetary Authority of Singapore, the standing of the SIC in the eyes of the market was assured. The secretariat of SIC is staffed by officers of the MAS, and the majority of the SIC are mostly from the private sector (with the remaining staff from the public sector).

Thus, the SIC was formed pursuant to the Securities Industry Act 1973,[35] and continued under the Securities Industry Act 1986 and its successor, the Securities and Futures Act. Its legislative role is stated widely, which was to engage in 'more effective, administration, supervision and control of takeover offers and matters connected therewith'.[36] In 1974, the Takeover Code was introduced.[37] While the SIC and the Takeover Code have statutory backing, the framework continues to be one of self-

[32] The terms of reference of the SIC, when set up, were: (a) advising the Minister for Finance on all matters affecting the securities industry; (b) advising the Stock Exchange on matters referred to it by the Exchange including matters affecting listing requirements and the suspension and delisting of companies; (c) recommending to the stock exchange action to be taken to prevent or expose abuses in the securities market including unlawful or dishonest forms of trading; (d) advising the Registrar of Companies on the activities of suspect companies; and (e) approving applications by companies wishing to raise money by a public issue in any form. See SIC Press Statement September 19, 1974, reproduced in Tan PT, at 35.

[33] See Pheng T Tan, *Securities Regulation in Singapore and Malaysia,* p. 34; and Pheng T Tan, 'Review of P.N. Pillai's Sourcebook of Singapore and Malaysian Company Law', *Malayan Law Review* 17 (1975). 392-397; see also 'SIC to be an adviser only', *Business Times* (12 January 1973).

[34] Hon Sui Sen, Minister for Finance, 'Securities Industry Bill 1970, Second Reading', *Singapore Parliamentary Debates*, 30 (1970), cols 461-7.

[35] No. 17 of 1973; the SIC was set up by Gazette Notification GN No. S No. S 182 of 1973.

[36] SFA, s 139(2).

[37] Companies Act 1967, s 179. This provision has since been repealed and moved to the SFA.

regulation, that is, compliance with the Takeover Code would primarily rest on the bid participants and their advisers.[38]

While a failure to comply with the Takeover Code does not, in itself, render the contravening person liable to criminal proceedings, such failure may be relied upon by any party to other proceedings (whether civil or criminal) as tending to establish or negate any liability which is in question in the proceedings, thus resulting in a disincentive for non-compliance with the Takeover Code.[39] However, as described below, the SIC may invoke sanctions as it may decide in relation to breaches of the Takeover Code, including that of public reprimand and withdrawal of facilities.[40]

Market participants in Singapore have largely accepted the authority of the SIC in Singapore. If there is a breach of the Takeover Code, the SIC may issue either a private reprimand or public censure. In a flagrant case, further action may be taken, including actions designed to deprive the offender temporarily or permanently of its ability to enjoy the facilities of the securities market;[41] this is also known as 'cold-shouldering'. Professional advisers working in Singapore will not advise a cold-shouldered party. The

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[38] See SIC, 'Regulatory Framework, Securities Industry Council and Takeover Code' in Wan and Varottil, *Mergers and Acquisitions in Singapore*, para 3.15

[39] See Companies Act 1967, s 179(11) and SFA, s 139(8).

[40] See SIC, *In the Matter of Jade Technologies Holdings Limited: Grounds of Decision of the Hearing committee appointed by the Securities Industry Council* (*Jade Technologies*) (14 October 2008) ("Re Jade Technologies") at ch 6, para [4.3]. The SIC stated that while findings on breaches of the Code may potentially overlap with findings of the courts, this should not deter SIC from making findings and imposing sanctions when appropriate.

[41] Takeover Code, Introduction, para 2.

SIC may also declare a person unsuitable to be a director of a publicly listed company for a specified period of time,[42] and award compensation orders.[43]

Although no case has reached the Singapore courts, judicial review is likely to be available for SIC decisions. [44] There are important differences in how the SIC functions in resolving takeover disputes, as compared to that of a judicial system.[45] Unlike the courts, the SIC is available for consultation and may give rulings in advance of the case. The SIC is also tasked with interpreting the application of the General Principles and the rules thereunder, and may grant waivers in appropriate cases. The proceedings are informal, private, and dealt with speedily.

2. The Takeover Code

The Takeover Code comprises General Principles, rules and notes. Nonetheless, the Takeover Code notes that it is impracticable to devise rules in sufficient detail to cover all circumstances that can arise in takeover and merger transactions. Accordingly, both the letter and spirit of the Takeover Code must be observed, especially in circumstances not explicitly covered by any Rules.

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42 In *Re Jade Technologies*, SIC censured the director and declared him, among other things, to be unsuitable to act as a director of a Singapore publicly listed company for a period of five years.

43 See n 77 below and accompanying text.

44 Section 139(7) of the SFA provides that 'The Securities Industry Council may issue rulings on the interpretation of the general principles and rules in the Take-over Code and lay down the practice to be followed by parties concerned in a take-over offer or a matter connected therewith, and such rulings or practice shall be final.' However, based on recent Singapore decisions on judicial review of other administrative findings, such review is likely to be available, despite the word 'final' in the SFA. See Wan and Varottil, *Mergers and Acquisitions in Singapore*, paras 16.23-16.25.

45 See Wan and Varottil, 'Regulatory Framework, Securities Industry Council and the Takeover Code' in *Mergers and Acquisitions in Singapore*

The Takeover Code is strongly geared towards shareholder protection. It has two primary aims; the first, to ensure equality of treatment of all shareholders of the same class, and the second, to ensure that target shareholders (and not the target board) decides the outcome of the bid. As part of the equality rule, the mandatory bid rule[46] requires a bidder which crosses certain thresholds to make a mandatory bid for all of the remaining shares at the price not less than the highest price of the shares acquired during the offer and in the preceding specified number of months (currently, and since 2002, six). Currently, a mandatory bid is triggered (1) If any acquirer, either on its own or together with parties acting in concert with it,[47] acquires an interest in 30% or more of the voting shares of the target company, or (2) if such an acquirer holds, either on its own or together with parties acting in concert with it, between 30% and 50% of voting shares of the target company, and acquires additional voting shares representing more than 1% of the voting shares in the target company in any six-month period.

The purpose of the mandatory bid rule is to allow the remaining shareholders to exit the target company at the price which the bidder paid for upon a change of control of the company. The Takeover Code also regulates the kinds of permissible offers, including

[46] Takeover Code, r 14.

[47] ‘Parties acting in concert’ comprise individuals or companies who, pursuant to an arrangement or understanding (whether formal or informal), cooperate, through the acquisition by any of them of shares in a company, to obtain or consolidate effective control of that company. Certain persons are presumed (unless the presumption is rebutted) to be acting in concert with each other. They include a company and its related and associated companies and companies whose associated companies include any of these companies. See Takeover Code, Definition 1.

the requirement of comparable offers,[48] best price rule,[49] restrictions on partial offer[50] and prohibitions on special deals not extending to other shareholders of the same class.[51]

The Takeover Code also prohibits the target board frustrating a bona fide bid in the absence of shareholder approval; this 'no frustration' rule, which has remained unchanged from its adoption in 1974, clearly supersedes the common law (and equitable) analysis of the duties of the target directors' duties owed to the company.[52] During the 1999 consultation, the SIC asked whether the US model of takeover regulation, which permits the target board to take defensive measures in hostile takeovers, should be adopted in Singapore. It was reported that there was a general consensus among the market participants for the retention of the UK model, as participants believed that shareholders should have the right to determine the outcome of the bid.[53]

III. LEGAL TRANSPLANTATION AND REASONS FOR THE ENDURING INFLUENCE OF THE CITY CODE

One of the powerful interest groups in Singapore is the major shareholders (generally family groups or the state).[54] While adopting UK takeover regulation in 1973

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48 Takeover Code, r 18.

49 Takeover Code, rr 14 and 15.

50 Takeover Code, r 16.

51 Takeover Code, r 10.

52 General Principle 2 of the Takeover Code recognises that the freedom of directors to act may be limited by the Takeover Code; see also s 159 of the Companies Act which expressly provides that directors of a Singapore-incorporated company are entitled to have regard to the Takeover Code and the rulings of the SIC in exercising their powers.

53 *1999 Consultation*, para 7.

54 Claessens, Djankov and Lang, 'The separation of ownership and control in East Asian Corporations', n 8.

was a ‘calculated risk’ given the lack of Singapore having a counterpart to the London City, the continued relevance of the UK model of takeover regulation is puzzling and requires an explanation. *Prima face*, for shareholders who have significant shareholdings but do not control more than 50% of the target, the mandatory bid rule limits their flexibility to increase their stake unless they are prepared to make a mandatory bid. The mandatory bid rule also may deter bids for the shares held by significant shareholders given that they cannot receive a control premium not shared with the other smaller shareholders. Further, the no-frustration rule appears to be superfluous if the board is itself controlled by the blockholders. Yet, the market participants in the 1999 consultation exercise (including the significant interest groups of blockholders and their advisers) supported the retention of the UK-style of takeover regulation.

This Part explains the reasons for the continued operation of the UK-style of takeover regulation through the perspectives of the ‘demand’ and ‘supply’ side of takeover regulation. It argues that while the UK takeover regulation appears to be designed to encourage hostile takeovers and benefit the smaller dispersed shareholders, Singapore’s adoption and variation of the UK-model of takeover regulation has in fact been responsive to the interests of blockholders.

1. The influence of blockholders in takeover regulation

(a) The mandatory bid rule

The mandatory bid rule was in the City Code since its inception in 1968. Essentially, the rule requires a person and its concert parties who have acquired control of

the company to make a bid for the remaining shares at no less than the price which he has paid for such control. Between 1968 and 1972, the control threshold in the City Code was qualitatively defined as 'effective control' and the mandatory bid was triggered if directors whose shareholdings effectively controlled the company are selling their shares to the buyer. Effective control involved an assessment of the ability of the holder of the shares to significantly influence the affairs of the company and conduct them to his wishes.[55] . In 1972, the mandatory bid rule was changed to include a fixed numerical threshold at 40%. In 1974, the qualitative threshold was removed and the mandatory bid for the threshold was strictly defined as 30% in 1974;[56] at the same time, the creeper provision, mandating a mandatory offer if the person and his concert parties held between 30 to 50% of the shares and acquired 2% in any 12-month period, was introduced. [57] The creeper rule was eventually abolished in 1998.[58] The rationale for the mandatory bid rule is to ensure that minority shareholders are treated equally and have a guaranteed right of exit upon a change of control, after a series of scandals where a change of control took place and the minority shareholders were not able to share the gains.[59]

In Singapore, when the Takeover Code was first promulgated in 1974, adopting the concept of the quantifiable threshold in the City Code, the mandatory bid threshold

55 See Laurance Rabinowitz (ed.), *Weinberg and Blank on Takeovers and Mergers*, 5th ed. (Sweet and Maxwell, 1989 and Supplement, 2008), para. 4-8004.

56 See 'Revised City Code Sets out New Rules on Mandatory Bids', *Times (London)* (6 June, 1974), p. 19.

57 See Johnston, *The City Takeover Code,* pp. 95-96.

58 In UK, with effect from August 1998, the UK Takeover Panel abolished the creeper provisions of rule 9 of the then City Code, which allowed a person who held between 30% to 50% of the voting rights of a public company to increase his holding by up to 1% in any 12-month period without having to make a mandatory bid for the company under rule 9.

59 See Armour and Skeel, 'Who Writes the Rules for Hostile Takeovers, and Why', n 6, pp. 1763-1764.

was fixed at 20%. It is not clear why the threshold was fixed at 20%, given that since shareholdings are more concentrated than in the UK, one would expect that the threshold would be higher than that in the UK. In 1979, the creeper provision was introduced, following the UK which introduced its creeper provision in 1974. The creeper provision in Singapore then mandated a mandatory offer if a person and his concert parties held 20% to 50% of the shareholding and acquired 2% in any 12-month period. [60] The mandatory bid threshold and the creeper provision were revised to 25% and 3% in any 12-month period respectively in 1985.[61] After extensive consultation in 1999, a further revision was made to 30% and 1% every 6 month period in 2002, which remains till today.

The evolution of the mandatory bid rule in Singapore shows how the regulatory framework has been responsive to existing blockholders. The progressive increase in the mandatory bid threshold from 20% in 1974 to ultimately 30% in 2002 and the decision to retain the creeper provision, despite its abolition in the UK in 1998, allows existing blockholders to marginally increase their stake in the company without having to make a mandatory bid for the remaining shares.

(b) No frustration rule

[60] 'Sweeping revision in code on takeovers' *Business Times* (30 June 1979).

[61] 1999 Consultation, para 19

In 1999, after extensive consultation, the preference of the market participants was to retain the prohibition against frustration of bids in the absence of shareholder approval over the US model of takeover regulation which allows the board to block unwanted takeovers in certain circumstances. Academic writers, including David Kershaw, have argued that the no-frustration rule in the City Code is largely redundant because other constraints exist in company law and stock exchange listing rules which prevent boards from taking out actions to frustrate bids that would have been permissible in the US.[62]

As in the UK, independent of the Takeover Code, Singapore's company law and stock exchange rules provide similar constraints on the board in erecting takeover defences. It is beyond the scope of this article to examine whether the no-frustration rule, in itself, is useful in providing protection for shareholders against management entrenchment. Suffice to say, while the no-frustration prohibition may not be relevant in the context of firms where controlling shareholders have a majority stake, it is unlikely that it serves no function in Singapore.

The reason is that majority-controlled companies are not the only forms of companies in Singapore. Even among companies that are not regarded as widely held, there exists the possibility where there is more than one significant block-holder and none of the significant blockholders has majority control. The presence of more than one block-holder will make it more difficult for any single blockholder (described as an

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62 David Kershaw, 'The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition', *International & Comparative Law Quarterly* 56 (2007), 267-307.

‘insecure blockholder’ above) to control the board. The data from Claessens et al shows that in 1996, 37.6% of the sample companies in Singapore which are not widely held have the presence of a single ultimate holder.[63] Thus, the data suggests that there remains a significant proportion of companies which, though are not regarded as widely held, have no single ultimate owner; in these cases, a bidder may still be able to succeed in a takeover bid that is opposed by some large shareholders. Thus, the no-frustration rule will limit the potential for these large shareholders to procure the board to prevent bona fide bids from succeeding, and fills a regulatory gap by benefitting non-controlling shareholders, even among companies are not regarded as widely held. The implication is that insecure blockholders may still support a rule that places limits on defensive actions taken by target management. This may explain why the market participants in 1999 continued to prefer a model where shareholders are the ultimate deciders on the outcome of the takeover bid.

However, while the no-frustration rule may encourage some shifts of control, the proportion of Berle and Means-type corporations in Singapore remains very small. In fact, Carney et al also show that the proportion of companies where there is absence of a single controlling shareholder has declined significantly from 70% in 1996 to 24% to 2008.[64] This signifies that the listed companies in Singapore are in fact becoming more concentrated. Part IV discusses the implication of these findings.

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[63] Claessens et al define single ultimate holders as a shareholder who has majority control or who holds at least 10% and where there is no second shareholder holding at least 10%. There are 221 companies in the sample.

[64] Richard Carney and Travers B Child, ‘Changes to the ownership and control of East Asian corporations between 1996 and 2008: The primacy of politics’ *Journal of Financial Economics* 107 (2013) 494-513.

2. The Regulator – Securities Industry Council

The endurance of the SIC has not only been due to its speed and flexibility in dealing with takeover disputes but also its ability and function to prioritise public interest over parties' private interests. The SFA expressly provides that the SIC may, in discharging its functions, have regard to 'the interest of the public [and] the protection of investors'. [65] In 1973, the choice of self-regulation was made over an independent regulatory body like the SEC. Once the SIC was in place, together with the nature and structure of the Takeover Code, the speed and manner in which SIC has acted in takeover disputes has pre-empted calls for legislative or other regulatory intervention. This has also led to the channelling of cases away from the courts as the primary place for the resolution of takeover disputes. The following sets out illustrative examples of the SIC's rulings.

(a) Public interest versus private ordering

Since 2000, there is a far greater emphasis by the SIC on market certainty and facilitating orderliness in the market, partly due to the fact that the markets were far less stable post-2001 terrorist attacks and the global financial crisis that started in 2007. This policy has translated to the SIC having a strong interest in ensuring offers that are announced being effected, unless defeated on regulatory grounds or any failure of the acceptance condition being fulfilled.

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[65] SFA, s 138(9).

The following examples demonstrate the SIC's interests in ensuring that the Takeover Code will prevail in two situations involving potential conflicts between the Takeover Code and contract law and the Takeover Code and company law respectively.

(1) Conflict between the Takeover Code and contract law

The situation involving bespoke and negotiated conditions provides an illustrative example of how priority is given to certainty and predictability, which may indirectly affect the party's strict legal position under contract law.

Once a bidder announces an intention to make an offer, the question often arises as to whether it can then not make the offer or terminate the offer on the ground of non-fulfilment of a condition. As a matter of contract law, if the offer is expressed to be conditional upon the fulfilment of a bespoke or negotiated condition (for example the net tangible asset value not being less than $100 million), any non-fulfilment will, in itself, be a sufficient ground to withdraw the offer. However, if a bidder is readily permitted to withdraw an offer, there may be grave uncertainty to the market because it is often not clear to minority shareholders whether a particular bespoke or negotiated condition will be fulfilled.

Under the Takeover Code, SIC's approval is required for the withdrawal of an offer and its approval is given only if the circumstances giving rise to such withdrawal

are not material in the context of the offer within rule 15.[66] In theory, the SIC only determines whether the offer can be withdrawn in the context of the Takeover Code and does not determine the contractual rights of the parties. However, in a prior work, this author has argued that the risk of inconsistency between the application of the provisions relating to bespoke conditions by the court (using contract law) and by the SIC is very real. Taking the case of the Singapore takeover of Mentor Media by Banta by way of a scheme of arrangement in 2002, there was a specific bespoke condition precedent in the implementation agreement, that is, the net tangible asset value of Mentor Media should not be below S$37.5 million. After the scheme of arrangement was announced but before the shareholders' scheme meeting was held, Banta took the view the NTA was below S$37.5 million and it was entitled to terminate the implementation agreement. Mentor Media disagreed, principally on the ground that the NTA requirement would be fulfilled by the date of completion of the scheme. When SIC ruled that Banta could not withdraw the offer, Banta proceeded to sue Mentor Media in the High Court for a declaration that the termination was valid. The matter was eventually settled out of court, with Banta paying S$8 million to Mentor Media.

The Mentor Media saga shows that even when the parties to the transaction have reached a commercial, negotiated agreement on what they consider to be the material, break-away thresholds of the transaction, it is still susceptible to being overridden by the SIC's discretion in not allowing the relevant condition to be invoked. As argued in a previous work, the reasons are founded on market certainty and orderly conduct, and that

[66] See discussion in Wai Y Wan, 'Invoking Protective Conditions to Terminate Public Mergers and Acquisitions Transactions' *Journal of Business Law* (2011), 64-90.

takeovers which have been announced should be completed unless they fail for regulatory reasons or fail to garner the requisite acceptances.[67]

The refusal of the SIC to allow the withdrawal of an offer has an important implication on the takeover process and indirectly the substantive rights of the parties. Even if the bidder were to litigate the matter in court, it is unlikely that the Singapore court would intervene to grant an injunction to allow the bidder to withdraw the offer. English case law has made it clear that irrespective of the parties' legal positions as to the right to withdraw an offer, the court should not generally intervene in an ongoing takeover, and following *ex parte Datafin*,[68] the court will defer to the regulatory primacy of the Takeover Code (or its equivalent) and the SIC (or its equivalent), and will not suspend the bidder's obligations to complete the transaction in accordance with the time-table under the Takeover Code. In such a case, while the bidder is not precluded from bringing litigation for damages (as the no-frustration principle applies only to the target board), the bidder will still be bound to complete the transaction in accordance with the fixed time-table set by the Takeover Code.

Even if the matter is ultimately heard at trial and the court reaches a different decision from the SIC, it will be too late for the bidder to unwind the acquisition once the

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67 See above. The principles have also been recently affirmed in in connection with the appeal of the ruling in respect of whether an offeror, CGNPC-URC, could reduce the offer price of Kalahari shares, after it had made an indicative offer; the City Code allows a reduction only in 'wholly exceptional' circumstances, and the Panel ruled that market integrity requires there to be certainty and orderly conduct, which prevails over the apparent advantages in allowing the price reduction, even if the target board consents to such reduction: see Takeover Panel Hearings Committee, 'Reasons for the Hearings Committee's decision' (PS 11/2011).

68 *R v The Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815.

acquisition is completed. In such a case, the bidder only has a paper victory. Thus, the process of takeover regulation has substantive consequences on the legal rights of the parties.

(2) Conflict between the Takeover Code and company law

The second illustrative example of the SIC's prioritising certainty and predictability over the parties' strict legal rights arises where there is a conflict between the Takeover Code and company law.

There is no issue if the conflict is between the Takeover Code and Singapore company law. If there is conflict between the duties faced by a bidder or target of a Singapore-incorporated company under the Takeover Code (such as in respect of the no-frustration rule) and its duties at common law (including equitable principles), the board of the Singapore-incorporated company is statutorily obliged to give precedence to the Takeover Code under the Companies Act.[69] The position is similar to that reached in the UK, even prior to the UK putting the City Code or the Takeover Panel on a statutory footing. In charting the history of the City Code, Sir Andrew Johnston noted the concerns by the UK City solicitors that the no-frustration rule in City Code could be inconsistent with the general obligations of directors under company law.[70] The UK Panel assesses the board's actions based on their objective effect, while the courts will assess the propriety of the board's actions based on whether the board has in fact exercised the decision for a proper purpose, which has subjective elements. The response to the conflict was that the

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69 Companies Act, s 159.

70 See Johnston, *The City Takeover Code,* n 21, pp. 147-148.

City Code was intended to restrict the actions of the boards of the target and the bidder, as provided by the general principle which expressly states that the actions of the boards of the bidder or target in the takeovers in respect of the offer to the target shareholders may be impinged upon. Sir Johnston argued that while there were several situations in the 1970s where there were potential conflicts between the City Code and the rulings of the courts, in none of these cases was there any judicial ruling which nullified the operation of the City Code.[71]

However, what if the director of a foreign-incorporated company faces conflicting obligations under the Takeover Code and his duties as a director under the company law

[71] The examples given were: (i) Guest, Keen & Nettlefold/ Miles Druce, where the UK Panel required the directors of the target to obtain shareholder approval before it could appeal to the European Court on the decisions of the Commission in allowing a hostile bidder to go ahead, this became moot when the bidder made market purchases so as to acquire control of the target; (ii) Ashbourne, where a shareholder of one member of the consortium bidder (C) started proceedings in the court to prevent C from bidding until shareholder approval of C was obtained, and the consortium bidder sued the vendors of the shares, claiming recession on the ground of misrepresentation; the consortium brought an injunction against the UK Panel, preventing it from issuing any director that restricts the consortium's exercise of voting rights. The High Court refused the injunction; (iii) Babcok & Wilcox/Herbert Morris, where the target sought an injunction in the US courts on anti-trust grounds against the bidder who incurred a mandatory bid but the longer-term injunction was eventually refused; (iv) Johnson & Firth/ Dunford & Elliot, where the target sought an injunction against a bidder, claiming unauthorised use of its information but the injunction was subsequently discharged by the Court of Appeal, on the ground that the injunction would not preserve the status quo; and (v) Graff Diamonds, a case where a party informed the UK Panel that legal proceedings were contemplated against the newspaper. The High Court allowed the UK Panel to proceed with investigations regarding the newspaper article, but did not allow its findings to be published, pending the conclusion of the action against the newspaper. See Johnston, *The City Takeover Code,* n 21, ch XII.

It was also reported that a ruling of the UK Panel was in direct conflict with the legal or equitable rights of third parties not involved in the takeover. See Geoffrey Morse, 'Controlling Takeovers – The Self-Regulation Option in the United Kingdom', *Journal of Business Law* (1998) 58-74 (referring to the 1995 decision of the UK Panel in respect of British Land Company's offer for Stanhope Properties, which owned 50% of a dead-locked joint venture company, Broadgate Properties. The other joint venturer of Broadgate Properties, R, argued that British Land should offer for all of the remaining shares of Broadgate Properties, on the basis of the chain principle. By ruling that there was no obligation to make an offer for the remaining shares, the UK Panel potentially abrogated the rights of R, to whom Stanhope (now controlled by British Land Company) might have owed fiduciary duties towards.

of the place of incorporation? An interesting situation arose in the takeover offer by Multi-Fineline Electronix, Inc ("M-Flex") for MFS Technology Ltd ("MFS") but the matter was eventually overtaken by other events and no ruling was formally published. In 2006, M-Flex, a Delaware company listed on NASDAQ, announced its intention to make a pre-conditional offer to acquire MFS, a Singapore company listed on SGX. WBL held approximately 61% and 56% of M-Flex and MFS respectively. In connection with the transaction, WBL gave an irrevocable undertaking that subject to the approval of its shareholders, it would vote its M-Flex shares in favour of the transaction and accept the offer in relation to its MFS shares.

Subsequent to the announcement of the pre-conditional offer, M-Flex alleged that MFS had suffered significant declines in its businesses,[72] and that M-Flex's assumptions of MFS' revenue and net income were shown to be inaccurate. The board of M-Flex withdrew its recommendation and approval of the offer, on the ground of compliance with its own fiduciary duties owed under Delaware law. M-Flex applied to the SIC to withdraw its pre-conditional offer. The SIC refused to allow M-Flex to withdraw. M-Flex brought actions in the Delaware Chancery Court for a declaration that it was entitled to withdraw the offer because of fiduciary duties that the board owed under Delaware law. M-Flex also brought actions against WBL, arguing that WBL owed fiduciary duties to the minority shareholders of M-Flex under Delaware law not to exercise the irrevocable undertaking. The Delaware Chancery Court dismissed the case on the ground that the

[72] M-Flex argued that the net sales declined by 8%, gross profits declined by 48% and net income had declined by 85% for the third quarter of its 2006 fiscal year, compared to the comparable periods in the previous year. See Multi-Fineline Electronix, Inc, 'Form S-4/A', filed on 19 March 2007 at p. 72.

question was moot because by the time the matter was heard, the irrevocable undertaking of WBL had expired.[73] Ultimately, a subsequent attempt by WBL to obtain the approval of its shareholders for the proposed transaction was rejected by the shareholders.[74]

On these facts, the SIC's ruling appears correct because the relevant negotiated condition in that case was the net assets test, and it was not alleged that the net assets of the target had fallen below the contractual threshold. However, key important questions remain open. In particular, is there an obligation on the part of the board of M-Flex[75] to proceed with the offer under the Takeover Code, even if the board of M-Flex faces a conflict between their compliance of the Takeover Code and their fiduciary duties under Delaware law? The case was thus an interesting interface between the supremacy of the Takeover Code and the foreign domestic law governing the duties of directors. It is not easy to argue before the SIC that foreign law on fiduciary obligations should prevail over Takeover Code.

(2) Flexibility of remedies

When there is a breach or non-compliance of the Takeover Code, the SIC has a range of remedies at its disposal, including issuing reprimands to, or withdrawing facilities of the securities market from, the offending company and individuals (known as cold-shoulder orders). The SIC may disqualify a director from acting as a director of a

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73 *Multi-Fineline Electronix, Inc v WBL Corporation Limited* (2007) Del Ch LEXI 21.

74 'M-Flex Announces WBL Shareholders Vote Against Accepting The MFS Technology Offer', *PR Newswire* (26 June 2007).

75 Section 159 of the Companies Act does not apply to M-Flex, which is a foreign corporation.

publicly listed company.[76] The SIC can also make orders against the professional advisers. If there is a breach of the mandatory bid rule, the SIC can compel the party who triggered the bid to pay compensation. [77] The recent amendments to the Takeover Code in 2012 made it clear that SIC may also order compensation to be paid to shareholders or former shareholders by persons who have contravened other provisions of the Takeover Code, apart from rule 14 (relating to the mandatory bid rule).

More importantly, the SIC is able to make orders that are tailored to the situation at hand speedily or otherwise provides oversight to the parties to take actions that remedy the non-compliance. There are a number of examples. In a non-mandatory bid situation, the SIC has allowed the bidder to withdraw an offer where it is clear that the offending party is not able to complete the bid.[78] Where it appears that independent advice may be perceived to be compromised, the SIC has ordered that a second independent financial adviser be appointed.[79] Where a party is seeking to be released from a no-increase statement in circumstances where it has not expressly reserved the right to do so or in the absence of a competitive situation, the bidder was allowed to be so released in exchange for the target board's recommendation, subject to paying compensation to those shareholders who had traded in reliance on the no increase statement.[80]

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[76] See e.g. *Re Jade Technologies.*

[77] e.g. 'SIC orders Apollo chairman to pay shareholders', *Business Times* (30 August 1997). The offer ordered by the SIC was launched on 5 January 1998; 'Announcement: Compensation by Mr. Ng Kim Suan to Eligible Shareholders and Warrantholders of Apollo Enterprises Limited' *Straits Times* (5 January 1998).

[78] e.g. *Re Jade Technologies*.

[79] e.g. S Ng, 'Don't interfere with choice of IFAs in takeovers – regulator' *Business Times* (8 August 2002) (describing the takeover of Overseas Union Trust when the second IFA was appointed).

[80] Natsteel, 'Voluntary conditional cash offer by Standard Chartered Bank, for and on behalf of 98 Holdings Pte Ltd to acquire all the issued ordinary shares of $0.50 each in the capital of Natsteel Ltd' (13

Generally, market participants have complied with the orders of the SIC. [81] Where the bidder is not in a position to make the mandatory offer, the SIC has facilitated a process by which the bidder's existing shares are used as consideration to settle the compensation to the minority shareholders.[82]

Consistent with the goal of resolving uncertainty speedily and decisively, and yet preserving the right of the shareholders to receive bids, the SIC has issued a 'put up or shut up notice' to potential bidders to resolve uncertainty as to whether a bid is to be made.[83] Such a bidder must either declare a bid or be prevented from making a bid for the next six months.[84] The SIC has also administered an auction to determine which bid would prevail where there are competitive bids for the same target. [85]

As is the case of the UK Takeover Panel, the SIC has acted proactively in response to developments in takeovers. The range of orders that the SIC makes has

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November 2002), copy on file with author; see also SIC, 'Consultation Conclusions on the Revision of the Singapore Code on Takeovers and Mergers' (15 March 2007), at para 18.

[81] The situation may be contrasted with Hong Kong where the takeover panels have not made mandatory offers where there are insufficient financial resources. Executive Decision, 'SFC publicly censures Capital VC Limited and Yau Chung Hong in relation to a breach of the mandatory offer obligation in the Takeovers Code in respect of Longlife Group Holdings Limited. The SFC has also imposed a cold shoulder order against Mr Yau for a period of 18 months' (20 May 2012); Executive Decision, 'SFC Sanctions Raffles International Holdings Limited and Lai Kam Wing Jimmy in relation to a Breach of the Takeovers Code Concerning Dealings in Shares in FT Holdings International Limited' (29 January 2003).

[82] See SIC, 'Serial System' (12 October 2001).

[83] e.g. SIC, 'Public Statement on Parkway Holdings' (16 June 2010); SIC, 'Public Statement on Sanion Enterprises' (19 November 2002).

[84] Takeover Code, rule 33.

[85] e.g. SIC, 'Public Statement on Competitive Situation in relation to Fraser and Neave' (15 January 2013).

ensured that it is able to resolve disputes speedily and to minimize uncertainty in the market. The SIC also reviews developments in other jurisdictions in determining whether amendments to the Takeover Code are necessary.[86] These actions and SIC's track record have thus far pre-empted calls to legislatively intervene in other matters.

IV. EFFECT OF LEGAL TRANSPLANTATION ON SHAREHOLDING STRUCTURES AND THE MARKET FOR CORPORATE CONTROL

1. Differences in shareholding structures

Consistent with many Asian jurisdictions, listed firms in Singapore are highly concentrated, with the state and families being the predominant controlling shareholders. Empirical studies (unpublished) have reported the high concentration of the shareholdings in these groups of shareholders in listed firms in Singapore in the 1960s.[87] Post-promulgation of the Takeover Code in 1974, the shareholdings remain concentrated in families and the state.[88] Two of the first comprehensive (and published) studies were done by La Porta et al.[89] and Claessens et al.[90] La Porta, who investigated the control structure

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86 e.g. 1999 Consultation Paper; 2001 Consultation Paper.

87 See Watt M Tay, 'Ownership and Control of the Singapore Public Companies, (1940-1962)' University of Singapore, Department of Economics, (1963-64), whose study of 66 listed companies in 1963 showed that for 77.3% of the 66 companies, the largest 20 shareholders in each case held in aggregate more than 50% of the votes.

88 A study on the ownership and control of among others, six publicly-listed banks in Singapore, in the late 1970s also demonstrates the high concentration of these banks in the hands of families and directors. Of the six banks, four of them have directors whose deemed shareholdings represent 22% to 41% of the voting rights, one has directors whose shareholdings represent 9% of the voting rights and the last is 49.4% held by the state. See Sheng Y Lee, 'Ownership and Control of Local Banks' *Business Times*, (24 February 1981).

89 Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'Corporate Ownership Around the World', *Journal of Finance* 54 (1999), 471-518.

90 Claessens, Djankov and Lang, 'The separation of ownership and control in East Asian Corporations'

of firms in 27 countries in the early 1990s and found that for Singapore, 45% of large[91] publicly traded firms were controlled[92] by the state, 45% by families and 5% were widely held; the data was obtained from a sample of the 20 top companies by market capitalization as at 1995. In comparison, the averages across the 27 countries were 20%, 35% and 25% respectively. Claessens et al, in their study of shareholding structures of nine East Asian countries (including Singapore) reported that the corresponding percentages for state, family and widely held firms were 21.8%, 53.3% and 2.5% respectively as of 1996 (based on a sample size of 200 firms).

A separate study on listed firms in Singapore as at 1995 showed that mean and median total ownership by substantial shareholders (owning 5% of more the voting shares) was more than 60%.[93]

This pattern of concentration is also demonstrated in more recent studies. A study in 2011 on 743 listed companies on SGX shows that the average top 20 ownership concentration is 80.5% for family firms and 76.1% for non-family firms.[94] On average, families owned a 39.9% stake among the top 20 owners and 38.3% among the top five owners.

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91 These are the top 20 firms ranked by market capitalization of common equity at the end of 1995.

92 Using 10 percent of voting rights as the criterion for control.

93 See Yuen T Mak and Yuan Li, 'Determinants of corporate ownership and board structure: evidence from Singapore' *Journal of Corporate Finance* 7 (2001) 235-256.

94 Marleen Dieleman, Jungwook Shim and Muhammad Ibrahim, 'Asian Family Firms: Success and Succession; A Study of SGX –listed Family Firms', Centre for Governance, Institutions and Organisations, National University of Singapore Business School and DBS (2011), available at bschool.nus.edu/Portals/0/images/CGIO/Report/Asian%20Family%20Business%20Report.pdf. Family firms are defined in their study as firms where the founders or co-founders of their respective family members are present among the 20 largest shareholders or as board members.

A more recent study by Carney et al[95] of nine East Asian countries on shareholdings in 2008, [96] which compares with the data from Claessens et al (described above), reported that the corresponding percentages for state, family and widely held firms were 20.5%, 60.2% and 8.4% respectively as of 2008 (for 131 firms), which compares with 21.8%, 53.3% and 2.5% respectively as of 1996 (for 200 firms). Thus, while there is an increase in widely held firms, the state and families still continue to dominate, the listed firms in Singapore, with families showing a larger increase in concentration. [97]

Carney et al also reports a large increase (from 30.1% to 75.9%) in the sample of companies of 2008 that are not widely held to have single ultimate owners, as compared to those of 1996.[98] Pyramid structures also declined significantly between 1996 and 2006.[99]

The empirical evidence on increase in concentration of shareholdings between 1996 and 2008 should be viewed in the context of the changes in the stock exchange framework that took place during that period. Prior to the Asian financial crisis in 1997, it

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95 Carney and B Child, 'Changes to the ownership and control of East Asian corporations between 1996 and 2008: The primacy of politics'.

96 The nine East Asian countries are Hong Kong, Indonesia, Japan, South Korea, Malaysia, Philippines, Singapore, Taiwan and Thailand.

97 Carney et al shows that between 1996 and 2008, the family and state dominated firms constituted 29 and 10 out of newly listed firms, compared to 9 widely held firm.

98 Cf Claessens et al, n 63 reports 37.6% of the companies having single ultimate controlling shareholders for a larger sample size.

99 The decline is 68.2% in 1996 to 22.7% in 2006.

was reported that there were approximately 30 listed companies (mostly blue chip companies) had foreign shareholding limits ranging from 20% to 49%, which were either imposed by statute or voluntarily.[100] As at 1998, 12 of these companies traded in local and foreign tranches (which occurred once the foreign shareholding limits were reached).[101] Foreign shareholding limits had prevented control of the companies from falling into the hands of foreign investors. However, it has been demonstrated empirically that such limits are costly to the shareholders as they impede a change of control.[102] By 2002, most of the companies had removed their foreign shareholding limits and merged the foreign and local tranches.[103] The removal of these limits should have led to an increase in the separation of ownership and control; however, the reverse has occurred.

These findings may be contrasted with the UK, which has had the mandatory bid rule since 1968.[104] In UK, it has been documented that ownership began to separate from control since 1940s due to various factors including taxation policies that favour the exit of blockholders and policies inducing institutional shareholders to buy shares.[105] With the promulgation of the City Code, acquirers tend to acquire just less than 30% so that they

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[100] See Yuen T Mak and Phillip Phan, 'Corporate Governance in Singapore: Current Practice and Future Developments', OECD Conference on Corporate Governance in Asia: A Comparative Perspective (1999) at 385. The data by Carney et al captures the largest 200 companies by capitalization. Most, if not all, of the companies that had the foreign and local tranches (which tended to be the largest companies) would have fallen within the largest 200 companies by capitalisation.

[101] Swee S Lam, 'Control Can Be Costly: A Lesson To Learn About Imposing Restrictions on Foreign Share Ownership', Faculty of Business Administration Working Papers, National University of Singapore (1997)

[102] Swee S Lam, 'Restrictions on Foreign Share Ownership and its Impact on Market Capitalisation and Liquidity' *Stock Exchange of Singapore Journal* 23 (1995), 4-11.

[103] In May 1999, MAS lifted the 40% foreign shareholding limits for Singapore-incorporated banks. The limit of 20% was lifted for Singapore-incorporated finance companies in 2002.

[104] Rabinowitz (ed.), *Weinberg and Blank on Takeovers and Mergers*, para. 4-8005.

[105] See Brian Cheffins, *Corporate Ownership and Control* (Oxford University Press, 2008), ch 9.

can exercise de facto control without triggering the mandatory bid rule.[106] The mandatory bid rule also explains, at least partially, why few shareholders of UK listed companies have block shareholdings beyond the 30% mark.[107]

Thus, there is evidence that for companies which begin with fairly dispersed shareholdings, the mandatory bid rule has tended to reinforce the separation of ownership and control. In Singapore, where shareholdings of companies are highly concentrated, we have empirical data which shows an increase in concentration in shareholdings during the period 1996 to 2008. While we do not have direct empirical data to show the impact on shareholdings as a result of the promulgation of the mandatory bid rule in the Takeover Code in 1974, the mandatory bid rule (together with its exceptions) has not resulted in a similar greater dispersion in shareholdings; in fact the rule may even reinforce the concentration of shareholdings in a stable investment climate (as the past few decades have been for Singapore). The reason is that acquirers lack the incentives to make bids exceeding the mandatory bid threshold since they cannot offer premium prices to blockholders without sharing such price with minority shareholders, making acquisitions more expensive for acquirers. This experience is not unique to Singapore. Other countries have undergone a similar experience. In the case of Italy, where public companies are characterised by concentrated shareholdings, there has been an increase in the number of

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[106] See F Barca and M Becht, *The Control of Corporate Europe* (Oxford University Press, 2001), pp. 12, 36, 280.

[107] See John Armour and Jeffrey Gordon, 'The Berle-Means Corporation in the 21st century'; *Yale Law School Working Papers* available at https://www.law.yale.edu/system/files/documents/pdf/Intellectual_Life/Armour_BerleMeansCorp091021.pdf (accessed 30 June 2016), at p. 18.

companies holding between 30 to 50% shareholdings, and no significant rise in dispersed ownership since the adoption of the mandatory takeover bid rule in 1997.[108]

At this juncture, it should be pointed out that this paper does not make the claim that abolishing the mandatory bid rule will result in greater diffusion in shareholding. Rather it makes the claim that the adoption of the UK model in a jurisdiction with concentrated shareholdings will *not* promote diffusion in the shareholding; on the contrary, it may even result in further concentration of shareholdings. This increase in concentration of shareholdings cannot be explained by suggesting that other aspects of the law and regulation unique to Singapore favour controlling blockholders; Singapore shares a similar approach of regulating blockholders with the UK. Both the UK and Singapore have similar (though not identical) rules in the companies' legislation and listing rules regarding the disclosure of blockholdings.[109] Both also have similar legal constraints on corporate insiders and controlling shareholders in gaining disproportionate benefits of private control at the expense of minority shareholders.[110]

2. Market for corporate control

(a) Hostile v friendly bids

108 Marco Ventoruzzo, 'Takeover Regulation as a Wolf in Sheep's Clothing: Taking UK Rules to Continental Europe' U Penn Journal of Business Law 11 (2008) 135-174.

109 In Singapore, SFA, s 135-7 (requiring disclosure of substantial shareholding, that is shareholding of 5% or more). In UK, the threshold is 3%.

110 In Singapore, chapter 9 of the SGX listing rules require shareholder approval for transactions with interested persons (defined as including directors and controlling shareholders) whose percentage ratio is 5% or greater of the net tangible asset value (NTA) of the target and disclosure if the percentage ratio is 3% of the NTA. Similarly, the FSA Listing Rules 11 requires shareholder approval for transactions with related parties (defined as including directors and shareholders holding at least 10%) unless they are exempted (such as small transaction where the relevant percentage ratio based on assets, profits, consideration to market capital and gross capital is less than 0.25%).

Table 1 contains the data for public takeovers of Singapore and UK listed firms for the period 2000 to 2014. The overwhelming majority of the deals in UK and Singapore proceed by way of friendly bids. UK has comparatively more hostile bids (defined as an unsolicited offer that is resisted by target management) and unsolicited bids than Singapore.[111] Thus, for those who argue that the disciplinary effect of hostile takeovers on management is good for the market,[112] the implementation of UK-style takeover regulation has not led to such disciplinary effect in Singapore.

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[111] The significant contested bids between 2000 to 2014 were found in companies where there was more than one controlling blockholder, including the takeover offers for (1) OUB by DBS and UOB in 2001; (2) NatSteel by 98 Holdings and Oei Hong Leong in 2002; (3) Parkway Holdings by Khazanah and Fortis in 2010; (4) Portek International by Mitsui and International Container Terminal Services in 2011 (5) Fraser & Neave by Thai Beverage and OUE in 2012; (6) Straits Trading by Lee and Teticity in 2008; and (7) WBL by Straits Trading and United Engineers in 2013.

[112] See Easterbrook and Fischel, *The Economic Structure of Corporate Law*, pp. 171-73

Table 1: M&A deals announced for the period 2000 - 2014 (inclusive) for targets listed in Singapore and UK[113]

Singapore

	(1)	**(2)**	**(3)**	**(4)**	**(5)**	**(6)**	**(7)**
Location of target	**Total number of deals**	**Friendly**	**% of (1)**	**Hostile and Unsolicited**	**% of (1)**	**Neutral**	**% of (1)**
Singapore (Mainboard and Catalist)	1400	1084	77.4	5	0.4	311	22.2
UK (Mainboard and AIM)	4371	3739	85.5	166	3.8	466	10.7

(b) Going private transactions

Going private or privatisation transactions refer to transactions in which an acquirer can compulsorily acquire 100% of the target, even if there are dissenting shareholders who do not wish to sell. Where the acquirer is an existing controlling shareholder of the target, it can extract private benefits of control by compelling the minority shareholders to sell to it at a coercive offer price that reflects the discount to the private benefits of control obtainable by holding 100% of the target.[114]

[113] Source: Table 1 report figures on M&A activity from 2000 to 2014 (inclusive) taken from *SDC Platinum*, a subscription based service. The tables show the attitude of the target board. *SDC Platinum* characterizes the deals as friendly, neutral, unsolicited, hostile and not applicable. Column (1) shows the total number of M&A deals in Singapore and UK respectively where the deal attitude is relevant. Those which are characterised as not applicable (such as privately negotiated acquisitions of less than 30%) are excluded. Columns (2) and (3) show the number, and percentage, respectively, of these transactions that were friendly. Columns (4) and (5) show the number, and percentage, respectively of these transactions that were hostile and unsolicited. Column (5) and (6) show the number, and percentage, respectively of these transactions that were neutral.

[114] See Ronald Gilson and Jeffrey Gordon, 'Controlling Controlling Shareholders' *University* of *Pennsylvania Law Review* 152 (2003), 785-843 at p. 796.

Many jurisdictions, including UK and Singapore, recognise that there are benefits in allowing acquirers to obtain 100% of the target. Similar to the UK, companies in Singapore may be privatised via: (1) a scheme of arrangement under section 210 of the Companies Act; or (2) a general offer followed by compulsory acquisition under section 215 of the Companies Act or its equivalent under the relevant law of incorporation. In the case of a scheme of arrangement under section 210 or a compulsory acquisition under section 215, where the acquirer is the controlling shareholder, the target shares of the acquirer cannot count towards the shareholder approval threshold.

Existing controlling shareholders seeking to take the company private may choose to effect the delisting of the target company in conjunction with a general offer (also known as an exit offer); the delisting of the target would normally induce shareholders to accept its offer, even if they are of the view that the offer price under-values the company, lest they end up with shares of a delisted company. This will often be followed by a compulsory acquisition if, post-offer, over 90% of shares are controlled by the acquirer.

The requirement for a delisting in Singapore is the approval of 75% of the total number of issued shares of the company held by shareholders present and voting on a poll, and not opposed by shareholders holding 10% or more of the total number of issued shares present and voting on a poll.[115] The delisting must also be accompanied by an exit offer, which is normally in cash.[116] Unlike a scheme of arrangement or a compulsory acquisition, the votes of controlling shareholders, including those making the exit offer, can count towards the approval threshold for the delisting resolution.

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[115] SGX listing rules, r. 1307.

[116] SGX listing rules, r. 1309.

In UK, the processes and approvals thresholds for achieving the scheme of arrangement and compulsory acquisition are similar to Singapore.[117] However, the delisting criteria in the two jurisdictions are not identical. In UK, for Mainboard companies, prior to May 2014, acquirers which achieve 75% of the target pursuant to a takeover offer can then effect a cancellation of listing with the appropriate notice. Otherwise, a withdrawal of listing requires a special resolution of the shareholders, present and voting. In May 2014, the listing rules[118] were amended and an acquirer, which has more than 50% of the target and is seeking to withdraw the premium listing after its takeover offer of the target upon reaching 75%, must also obtain acceptances from the majority of the minority shareholders. [119] (The May 2014 amendments allows the majority of the minority shareholders to be disapplied if an existing controlling shareholder achieves 80% shareholding of the target after a takeover offer. However, this disapplication exception was removed in January 2016.)[120] In a non-takeover situation, an issuer would require approval of 75% of the shareholders, present and voting. Where there is a controlling shareholder, it has to be separately approved by a majority of the votes held by the independent shareholders.[121]

[117] UK Companies Act 2006 Part 26 and Part 28, Chapter 3, respectively

[118] FSA Listing Rules 5.2.11D. The rules were amended to provide greater protection for minority shareholders in controlled companies, in light of the corporate governance scandals surrounding these companies, such as Bumi (now renamed Asia Mineral Resources), Eurasian Natural Resources Corporation (now de-listed) and Essar Energy; see Roger Barker and Iris Chiu, 'Protecting Minority Shareholders in Blockholder-Controlled Companies – Evaluating the UK's Enhanced Listing Regime in Comparison with Investor Protection Regimes in New York and Hong Kong' Capital Markets Law Journal 10 (2014) 98-132.

[119] Listing rules, rule 5.2.11A.

[120] FSA Listing Rules 5.2.11D. The FCA found that this disapplication had "potentially significant consequential and unintended implications for investor protection". If an offeror already held 80% of the issuer's voting share capital, it had the ability to cancel the issuer's listing without either independent shareholder approval or its offer being accepted by any independent shareholders.

[121] Listing rules, rule 5.2.5 R.

For AIM companies, issuers which wish to cancel their listings must obtain the consent of at least 75% of the shareholders given at a general meeting.[122] One of the exceptions is where there is a takeover which has become wholly unconditional and the offeror has received valid acceptances in excess of 75%. If an AIM company is subject to a takeover offer and the acceptance condition is stipulated at less than 75%, the holders of the AIM company's shares will still be required to pass a vote of at least 75% in favour of cancellation of its AIM admission. [123]

The delisting rules found in UK for the Mainboard companies are generally more favourable to minority shareholders. Even pre-May 2014, the acquirer of an UK target must achieve acceptances and holdings amounting to 75% before it can commence the delisting process. The lack of response on the part of passive or untraceable shareholders will work against the acquirer. In Singapore, the threshold for approval of the delisting proposal is 75% with not more than 10% voting against, of shareholders present and voting. In such a case, lack of response on the part of passive or untraceable shareholders will work in *favour* of the acquirer. Post-January 2016, a UK acquirer, being an existing controller, who achieves 75% acceptances or holdings must obtain acceptances from the majority of the minority shareholders; there is no requirement to seek independent minority shareholder support in Singapore.

While the UK delisting rules for Mainboard companies will still not completely protect minority shareholders from coercive offers which materially undervalue the

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[122] London Stock Exchange, AIM Rules for Companies, rule 41.
[123] AIM: issue 5 of Inside AIM newsletter (October 2015).

target, the free float requirement on the London Stock Exchange of 25%[124], higher than the SGX's requirement of 10%, makes it more unlikely for the controlling shareholder to obtain the approvals without having made a sufficiently attractive offer.

While it is too early to note the impact of the amendment to the listing rules in the UK for Mainboard companies, Table 2 shows the proportion of going private transactions between 2010 to 2014 in the UK and Singapore that have been effected by way of schemes of arrangement, general offers and exit offers (which are offers that are made by existing controlling shareholders in connection with the proposals to delist the company).

For Table 2, the UK data is obtained from the transactions reported in *SDC Platinum Database* and *Practical Law for Companies*. The Singapore data is obtained from transactions reported in *SDC Platinum Database*, and due to the incompleteness of some of the data, we have cross-checked with the filings by these companies on the SGX's website, using the search 'Shareholders' Circular', for the relevant years, and supplemented by cross-checking with the filings.

Table 2: ***Deal structures for completed going private deals for targets in Singapore and the UK for the period 2010-2014 (both dates inclusive)***[125]

[124] This free float requirement is only for Mainboard companies. There is no free float requirement for companies listed on AIM: see AIM regulation: Inside AIM - Consideration of Free Float and Systems, Procedures and Controls - Financial Policies and Procedures (1 June 2015).

[125] Table 2 reports figures on going private deals from 2010 to 2014 (inclusive). The Singapore data is obtained from SDC Platinum, supplemented with inspection of circulars found on the Singapore Exchange's website at www.sgx.com; the UK data on schemes and offers is obtained from *SDC Platinum database*, and the data on the delisting offer information is obtained from *Practical Law for Companies*. Column (1) shows the total number of going private M&A deals in UK and Singapore respectively. The number of going private deals is found from SDC Platinum coding the transaction as going private, or seeking 100% of the target and from *Practical Law for Companies*. Columns (2) and (3) show the number, and percentage, respectively, of these transactions that were structured as schemes. Columns (4) and (5)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Location of target	**Total number of going private deals**	**Schemes**	**% of (1)**	**General offers**	**% of (1)**	**Exit offers**	**% of (1)**
Singapore (Mainboard and Catalist)	124	6	4.8	82	66.1	36	29.80
UK (Mainboard and AIM)	327	139	42.5	188	57.5	8	2.4

Table 2 shows that the UK has a far higher percentage of schemes being used compared to Singapore, and that Singapore has a higher percentage of exit offers (coupled with delisting proposals) being used compared to UK. We suggest that the result can be explained by the differing requirements for effecting a scheme of arrangement as compared to the exit offer. To effect a scheme of arrangement, it requires a majority in number representing 75% of the shareholding in both jurisdictions. To effect the exit offer coupled with the delisting proposal, the threshold in UK is 75% (pre-May 2014) and 80% (post-May 2014), and in Singapore, it is 75%, with no more than 10% voting against. The main difference between the scheme of arrangement and the delisting proposal is that the bidder cannot vote its existing shareholdings in the schemes but is able to vote its existing shareholdings in the delisting proposal. [126] We predict that bidders

show the number, and percentage, respectively of these transactions that were structured as offers. Columns (6) and (7) show the number, and percentage, respectively of these transactions that were structured as delisting proposals, followed by exit offers.

[126] In Singapore, the bidder and its concert parties are prohibited from voting in the scheme: Takeover Code, Definition 1. In UK, case law has established that the bidder and its subsidiaries must form a separate class: see *Re Hellenic and General Trust* [1976] 1 WLR 123. For a general discussion on the UK position, see J Payne, 'Schemes of Arrangement, Takeovers and Minority Shareholder Protection' *Journal of Corporate Law Studies* 11 (2011) 67-97.

with significant shareholdings in the target are incentivised to proceed by way of an exit offer (coupled with the delisting proposal) in order to vote their existing shareholdings, rather than a scheme, in which any dissenters would have a comparatively large voice. Conversely, bidders with small existing shareholdings would prefer to use a scheme to take advantage of the cram-down provision, as not being able to vote their stake would not make a significant difference.

Table 3 shows the shareholdings of the companies that have undergone schemes of arrangement for the purpose of privatisation. The UK and Singapore data is obtained from *SDC Platinum*, and in the case of Singapore, due to the incompleteness of the data, also through inspection of the circulars. In the UK, the overwhelming majority of the schemes of arrangement relate to companies where there is no controlling shareholder or the bidder does not hold 25% or more of the target. For Singapore, while the sample size is much smaller, the results are similar. This is consistent with our prediction made above.

Table 3: Case studies on Scheme proposals for targets in Singapore and UK for the period 2010 -2014[127]

	(1)	**(2)**	**(3)**	**(4)**	**(5)**

[127] Source: Singapore data is obtained from the *SDC Platinum* database and inspection of the circulars. UK data is obtained from *SDC Platinum* database. Columns 1, 2, 3, 4 show the total number of companies where the shareholdings of the controlling shareholders or concert party group pre-offer is (1) less than or equal to 25%; (2) more than 25% but less than or equal to 50%; (3) more than 50% but less than or equal to 75% and (4) more than 75%. Column 5 shows the total number of transactions that are structured as schemes.

	Total number of schemes				
Location of target	Shareholdings pre-offer ≤% 25	Shareholdings pre-offer >25 ≤50%	Shareholdings pre-offer: >50 ≤75%	Shareholdings pre-offer >75%	Total
Singapore (Mainboard and Catalist)	4	1	1	0	6
UK (Mainboard and AIM)	127	6	3	3	139

Table 4 is the equivalent of Table 3 for delisting proposals coupled with exit offers, studying the shareholdings of bidders effecting privatisation through this route. UK data is obtained from *Practical Law for Companies*, and Singapore data is identified based on the filings by these companies on the SGX's website, using the search 'Shareholders' Circular', for the relevant years (for Singapore). The *SDC Platinum* database was used to cross-check the list of takeover offers, with omissions added to the sample by manually collecting from various sources. Again, we predict that the results will show that this route is popular among bidders with significant existing shareholdings.

Table 4: Case studies on delisting proposals for targets in Singapore and UK for the period 2010 – 2014 (both dates inclusive)[128]

[128] Source: Singapore data is obtained from the *SDC Platinum* database and inspection of the circulars. UK data is obtained from *Practical Law for Companies*, a subscription database. Column 1 shows the total number of voluntary delistings in Singapore and UK. Columns 2, 3, 4 and 5 show the total number of companies where the shareholdings of the controlling shareholders or concert party group is (1) less than or equal to 25%; (2) more than 25% but less than or equal to 50%; (3) more than 50% but less

	(1)	**(2)**	**(3)**	**(4)**	**(5)**	**(6)**	(7)
	Total number of voluntary delistings	**Total number of voluntary delistings (where exit offers are made by existing shareholders)**					Total number of voluntary delistings where no offers are made)
Location of target		Shareholdings pre-offer ≤% 25	Shareholdings pre-offer >25 ≤50%	Shareholdings pre-offer: >50 ≤75%	Shareholdings pre-offer >75%	Total	
Singapore (Mainboard and Catalist)	36	1	6	13	16	36	0
UK (Mainboard and AIM)+	116	1	0	4	3	8*	96*

*The 8 transactions involve exit offers being made by existing shareholders. There are another 12 transactions where the offer is made by the company (such as via a share buy-back or scheme of arrangement) but which are not included since the study only relates to exit offers made by existing shareholders.

+ In May 2014, the Mainboard rules were amended to include a more stringent criteria for delistings; however, all of the delisting transactions where exit offers are made were made for Mainboard companies were made before May 2014.

Table 4, as with Table 3, matches this author's prediction. The shareholding percentages of bidders in companies making exit offers in conjunction with a delisting

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than or equal to 75% and (4) more than 75% respectively. Column 6 shows the total number of withdrawals of delistings where exit offers by controlling shareholders are made. It should be noted that in the case of Singapore, all delisting proposals are required to be accompanied by exit offers. Column 7 shows the total number of withdraws of delistings where exit offers by controlling shareholders are not made.

are significantly higher than shareholdings of those offerors who effect privatisation by way of a scheme. A very significant majority of shareholders in both jurisdictions had more than 50% of shares in the target. For the 8 UK companies identified, all were companies where the controlling shareholders own 75% or more or at least are able to procure undertakings from shareholders such that they, together with the undertaking shareholders, control 75% or more of the target.

While the sample size of the companies is small as we have only investigated the five-year period between 2010 to 2014, the results in Tables 2, 3, and 4 are consistent with our prediction that in a jurisdiction where shareholdings are more diffused, the bidder seeking to privatise the company will prefer the more favourable shareholder approval for schemes of arrangement (which is a majority in number representing 75% of the shareholding, present and voting, excluding the bidder's shares) than in an exit offer (which is 75%). The converse is true for a jurisdiction with concentrated shareholdings.

The results above show that despite the legal transplant of UK rules to effect and govern takeovers in Singapore, the two jurisdictions have experienced opposite outcomes, possibly due to the difference in shareholding concentration. In particular, in Singapore where there are generally more concentrated shareholdings, bidders favour a method of privatisation which offers fewer protections to minority shareholders. In this author's view, the more widespread use of delistings as a means of effecting privatisations in Singapore is less of a concern if there are other robust methods of protecting minority shareholders. However, the only minority shareholder protection is

that the requirement in the listing rules that the exit offer must be reasonable,[129] which is not defined. It is expected that the SGX will base the reasonableness of the offer on the independent financial adviser (IFA) that is required to be appointed.[130] As argued in a previous work, the effectiveness of the IFA as a tool to protect investors is doubtful as the main concern being, as usual, that outside IFAs, even when chosen by independent directors, may be less independent than they appear to be, as they have incentives to gain from offering other banking and underwriting services and that they have the unfettered discretion to choose the methodologies to provide the valuation.[131]

V. RECENT TRENDS AND IMPLICATIONS

1. Rise in foreign listings and influx of foreign investment

The following sets out the analysis on the recent shareholding patterns in Singapore and its implications on whether the current enforcement framework of the takeover regulation is adequate.

First, there has been a rise in foreign listings. Since the Asian financial crisis, the SGX has aggressively encouraged the listing or cross-listing of foreign firms, particularly Chinese firms, in Singapore. Approximately 40% of the listed firms are now foreign

[129] SGX, 'Companies Seeking Delisting Must Provide Reasonable Exit Offer to Shareholders', *Regulator's Column* (4 September 2009).

[130] Wai Y Wan, 'Independent Financial Advisers' Opinions for Public Takeovers and Related Party Transactions in Singapore' (2010) 30 CSLJ 32.

[131] Ibid.

companies.[132] For many of these foreign firms, the SGX serves purely as external funding as the assets or operations are primarily outside Singapore.

The rise of these foreign listings has posed significant challenges to the enforcement framework.[133] In particular, the recent scandals of the S-Chips, which are SGX-listed firms but whose assets are operations are outside Singapore, demonstrate the inadequacy of an enforcement framework which is not adequately backed by statute. In the recent China Sky Chemical Fibre saga, a company incorporated in the Cayman Islands and which had primarily China-based assets, the board of the company initially refused to comply with the SGX's directive to appoint a special auditor, over the SGX's concerns as to its interested person transactions, the aborted acquisition and development of land in China and significant repair and maintenance costs incurred.[134] This was the first time where non-compliance with the SGX directive ordering the appointment of a special audit has occurred.[135] The SGX applied under section 25 of the SFA[136] to enforce compliance but the application was withdrawn shortly after it was filed.[137] Although no reasons were given for the withdrawal, it is likely that the SGX was unlikely to obtain the orders that are sought for two reasons: first, only the issuers are contractual parties to the

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[132] The statistics from the World Federation of Exchanges, as at July 2014, shows that 37% of the companies listed on Singapore Exchange are foreign companies.

[133] e.g. Paul M Jindra 'Securities Fraud in Singapore: China and the Challenge of Deterrence' *Columbia Journal of Transnational Law* 51 (2012) 120-176.

[134] For the background facts, see *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] SGHC 103

[135] Lynete Khoo, 'China Sky-SGX saga a test case', *Business Times* (11 January 2012).

[136] Section 25 of the SFA provides that a person 'who is under an obligation to comply with, observe, enforce or give effect to the …. listing rules' fails to do so, the High Court may, on the application of the SGX, make an order directing that the first-mentioned person to comply with observe, enforce or give effect to the listing rules.

[137] Lynette Khoo 'SGX backs down from court action against China Sky', *Business Times*, 12 January 2012.

listing rules and section 25 merely adds to the contractual basis of enforcement (and does not provide a new basis of enforcement against directors);[138] second, section 25 only refers to compliance listing rules and the SGX's directives (as opposed to the listing rules) do not strictly fall within the listing rules.

Second, there have been a number of high profile takeovers of established Singapore companies in the last decade by foreign corporations. Carney reported that between 1996 and 2008, 15 Singapore listed companies have been bought out by widely held foreign corporations. This figure was the highest among the nine East Asian jurisdictions.[139] This trend has continued post-2008. In 2012, Fraser and Neave, Limited (F&N) and Asia Pacific Breweries (APB) were taken over by Thai Beverage and Heineken, both of which are foreign corporations.[140]

Thusfar, national sentiment has not played a role and the takeovers of Fraser and Neave and Asia Pacific Breweries were largely driven by valuation. However, in the 1970s, arising from the activities of Slater Walker which made a takeover offer for Haw Par and subsequently acquired a controlling interests in a number of local firms, the media reported hostility by the businesses towards foreign participation in the local industries.[141] Arising from the Haw Par / Chung Khiaw affair, in 1971, the Monetary

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[138] See also discussion in Hans Tjio, *Principles and Practice of Securities Regulation in Singapore*, 2nd ed. (Lexisnexis, 2011), paras 5.03-04.

[139] Carney and Child, 'Changes to the ownership and control of East Asian corporations between 1996 and 2008'. See also L Yee, 'Foreigners streaming in to buy Singapore assets' *Business Times* (8 June 2006), listing the deals on major iconic brands owned by companies that have been taken over, including Raffles Holdings (which own Raffles hotel) and Robinson & Co (a major retailer).

[140] For a discussion on this, see Wan and Varottil, *Mergers and Acquisitions in Singapore,* ch 1. See also Kenneth Lim, 'F&N saga opens can of firsts for Singapore M&A' *Business Times* (18 February 2013).

[141] See P Pillai, 'Corporate Takeovers in Singapore'.

Authority of Singapore imposed a foreign shareholding limit of 20%, which was later increased to 40%, for Singapore banks in 1990.[142] That limit was abolished in 1999.[143]

Outside of the banking industry and other industries that are regarded as critical to national interests,[144] the Singapore Government has pursued a policy of an open economy. In 1974, arising from the Haw Par/PERNAS affair (which involved, among other things, financial irregularities with Haw Par leading to a Government investigation), the Minister made it clear that the Singapore Government would not pursue legislation that would protect Singaporean businesses and thus undermine Singapore's open economy.[145] The abolition of the tranches of foreign and local shareholding in the late 1990s and early 2000s outlined earlier is also evidence of further liberalization of the economy to allow for foreign interests.

The rise in foreign listings coupled with interest from foreign corporations raise the issue of whether the informal nature of takeover regulation undertaken by the SIC in

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[142] TK Soh 'Foreign Ownership for Local Banks Raised', *Business Times* (27 June 1990)

[143] 'The present situation is not sustainable', *Business Times* (18 May 1999)

[144] e.g. the Banking Act, Finance Companies Act, Newspaper and Printing Act. Certain companies critical to national interests also have 'special shares', such as Singapore International Airlines (to comply with the air service agreements that require the company to be held by Singapore nationals) and ST Engineering (which is involved with the area of national defence).

[145] Hon Sui Sen, Minister for Finance, *Singapore Parliamentary Debates*, 34 (1975) at col 1152:

> [Members of Parliament] will be aware of the efforts of my Ministry to encourage the further development of Singapore as a major regional and international financial centre. The success we have achieved has been due in large measure to our policy of welcoming the free inflow of all capital, whether regional or international, and whether for use directly in trade, industry or construction or merely for portfolio investments. Few if any restrictions are imposed on such investments which, when so desired, may be and often are in wholly-owned locally incorporated companies as well as in branches of foreign or multi-national companies. The presence of many old and new trading houses, manufacturing industries, banks, insurance companies, merchant banks, discount houses as well as holding companies and conglomerates is sufficient evidence of the effective operation of our policy. However, to ensure orderly conditions and fair terms of competition - and where many investors are concerned, fair treatment of minority interests - it has been necessary, here as elsewhere, to provide by law for the regulation of company operations.

Singapore will continue to endure. This issue is by no means new. In 1984, section 179 of the Companies Act 1967[146] dealing with takeovers was amended to specifically provide that the Takeover Code applies to local or foreign corporations.[147] The Government took the view that greater legislative intervention was necessary to give statutory teeth to the Takeover Code due to the influx of foreign investment.[148]

Thus far, while there have been progressive amendments to the legislative framework to give statutory teeth to the SIC and the Takeover Code, the legislation has not been amended to give backing to the SIC to apply to the court to enforce those orders. The provision is now present in the UK Companies Act 2006.[149] In this author's view, this is necessary. Aside from public censure and cold-shouldering the participants, a legislated power granted to the SIC to compel recalcitrant parties to comply with orders is needed. At present, market participants have largely accepted the authority of the SIC in Singapore without the requirement of statutory backing and enforcement powers. However, as demonstrated by the China Sky affair in the context of directives from SGX, foreign companies and their directors, who may not be used to self-regulation in Singapore, may refuse to comply with the directives and there needs to be means to enforce such directives, particularly for foreign companies.

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[146] This is now found in section 139 of the SFA.

[147] Companies (Amendment) Act 1984; Act Supplement No.15 of 1984.

[148] See MP Chan, 'Securities Regulation in Singapore and KL', *Business Times* (14 August 1984); also see the speech by the Minister for Law, *Singapore Parliamentary Debates* 43 (1984), col 346.

[149] Companies Act, s 955.

2. The potential overlap in jurisdiction between the SIC and the courts

Part 3 argues that the endurance of the SIC has been not only in its speed and flexibility in dealing with disputes but also its record and functions in prioritising public over private interests in appropriate cases. In the context of securities regulation, the remedial orders that may be made by the SIC are wide ranging and do not have a corresponding counterpart elsewhere. For example, MAS, the primary securities regulator, has no jurisdiction to grant compensation orders, nor does it have jurisdiction to apply to the court for orders to compensate people affected by the contravention of the market misconduct provisions of the SFA. Instead, persons affected by market misconduct will have to apply to court to seek civil compensation orders against the persons who have contravened the SFA.[150] In practice, there are significant obstacles to the recovery of such civil compensation by investors, which are documented elsewhere, including collective action problems and the statutory caps on recovery in certain cases.[151] In contrast, under the Takeover Code regime, the SIC carries out the investigation and makes remedial orders, which may include ordering the parties to pay the likely losses incurred by the investors.[152] As such, an investor is treated more favourably under the Takeover Code and is likely to favour SIC intervention.

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[150] SFA, ss 234 and 236.

[151] See discussion in Wai Y Wan, 'Enforcement of the Takeover Code and Market Misconduct in the Course of Takeovers' in Wan and Varottil, *Mergers and Acquisitions in Singapore*, ch 16.

[152] The Takeover Code (Takeover Code, Introduction, para 2) sets out the power to order compensation for contravention of the following non-exhaustive rules:

- Rule 10 (requires that a bidder treats all shareholders equally);
- Rule 14 (requires a mandatory offer to be made and the terms of the offer);
- Rule 15 (requires that a voluntary offer must be made on certain terms);
- Rule 16.4(g) (requires a bidder to make a comparable offer in the case of a partial offer);
- Rule 16.4(h) (requires a bidder to make an appropriate partial offer for outstanding convertible securities in the target);

Despite the SIC's ability to order compensation, the Takeover Code and the SIC will (in theory) not deal with the private law obligations that the participants are under in the takeover, such as whether a party is in breach of contract or breach of any other obligation imposed under general law. The SIC should also not deal with cases involving minority shareholder oppression, which is a matter of company law.[153]

However, there is still the potential for overlapping jurisdictions between the takeover regulator and the courts in regulating takeover offers. As set out in Part III above, in the interests of promoting certainty and predictability, the SIC has made rulings which may potentially conflict with the parties' contractual obligations and parties' duties under company law. Thus, while in theory, the remedial aims of the takeover regulator and the courts are different, the availability of relief (or lack thereof) will have substantive implications for the parties in their private law claims.

Further, General Principle 4 of the Takeover Code, which is no longer found in the City Code, provides that 'rights of control must be exercised in good faith and

- Rule 17 (requires a bidder to make a cash or securities offer);
- Rule 18 (requires a bidder to make a comparable offer for different classes of equity capital);
- Rule 19 (requires a bidder to make an appropriate offer to holders of convertible securities in the target);
- Rule 20.4 (requires a bidder to extend revised consideration to all accepting shareholders);
- Rule 21 (requires the revision of the offer price where purchases are made at above the offer price); and
- Rule 33.2 (requires a 6-month delay before acquisition at above offer price).

[153] Under the Companies Act, minority shareholders may make an application to the court for relief from compulsory acquisition under section 215, even if the bidder otherwise complies with the Takeover Code. See Umakanth Varottil, 'Compulsory Acquisitions and Squeeze out of Minority Shareholders' in Wan and Varottil, *Mergers and Acquisitions in Singapore*, ch 14 at paras 14.32-38.

oppression of the minority is wholly unacceptable'. The question then arises whether the SIC may, in the future, purport to assert jurisdiction over minority shareholder protection issues and thereby pre-empt the courts' determination. Currently, it does not appear likely since none of the detailed rules in the Takeover Code have been tied to this principle of unacceptable minority oppression.

It is submitted that there needs to be more open debate as to how to resolve the overlap in jurisdictions in regulating takeovers between the SIC and the courts. Although this paper is a comparison between UK and Singapore, Australia offers a potential solution to the problem. Section 659B(1) of the Australian Corporations Act 2001 prohibits the commencement of proceedings in 'relation to a takeover bid or proposed takeover bid, before the end of the bid period'.[154] The objective appears to give primacy to takeover regulation by prohibiting the bringing of court proceedings while the bid is in force. However, the provision is likely to be narrower than it appears; *Lionsgate Australia v Macquarie Private Portfolio Management,*[155] discusses whether a bidder may seek specific performance of a substantial shareholder's contractual promise to sell into the bid, prior to the expiry of the bid period. Austin J took a very restrictive reading of the provision, holding that the provision does not prevent such an action, which is an action to enforce a contractual right, not an action taken or to be taken as part of, or for the purposes of the bid. This article does not necessarily advocate that the choice made in

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[154] In the case of the scheme of arrangement, while the Australian Panel has powers to declare unacceptable circumstances under Corporations Act, s 657A(2)(a), it will generally not intervene: see Australian Takeovers Panel, 'Guidance Note 1', para 18. See RP Austin, 'The Courts and the Panel', *The Takeovers Panel After 10 years* (Jennifer Hill and RP Austin eds, Ross Parsons Centre of Commercial, Corporate and Taxation Law Publication Series, 2011), 131.

[155] [2007] NSWC 318.

section 659B(1) is appropriate in Singapore but that greater consideration needs to be given as to how to properly delineate the responsibilities of the SIC and the courts.

VI. CONCLUSION

The recent literature on comparative takeover regulation has demonstrated the reasons for the striking differences between the UK and US takeover laws, on the basis of interest group politics. This research shows that the theory can also be extended to Singapore which has transplanted the UK-style of takeover regulation and it explains why blockholders will also favour such a model. However, as the experience with Singapore shows, the transplantation of the mandatory bid rule and the no-frustration rule in a jurisdiction which is dominated by listed companies with concentrated shareholdings has led to quite different outcomes in the shareholding structures and the market for corporate control. The mandatory bid rule has led to a reinforcement of the concentration of shareholdings. Hostile or unsolicited takeovers are rare and the going private transactions are more likely to be effected by delisting proposals, where coercive offers are more likely to take place. Finally, this article addresses the prospect of formalising the existing takeover regulation model to give statutory teeth in respect of enforcement powers and the need for more open date as to how to resolve the potential overlap in the jurisdiction of regulating takeovers between the court and the SIC. The experience of Singapore has relevance to other emerging jurisdictions (whose shareholdings are more likely to be concentrated than dispersed found in advance economies) seeking to transplant, with or

without modifications, the mandatory bid rule and/or the no-frustration rule found in UK-takeover regulation framework.